Supreme Court of the United States

OCTOBER TERM, 1924.

No. 112.

RED CROSS LINE,
Petitioner,
v.
ATLANTIC FRUIT COMPANY,
Respondent.

BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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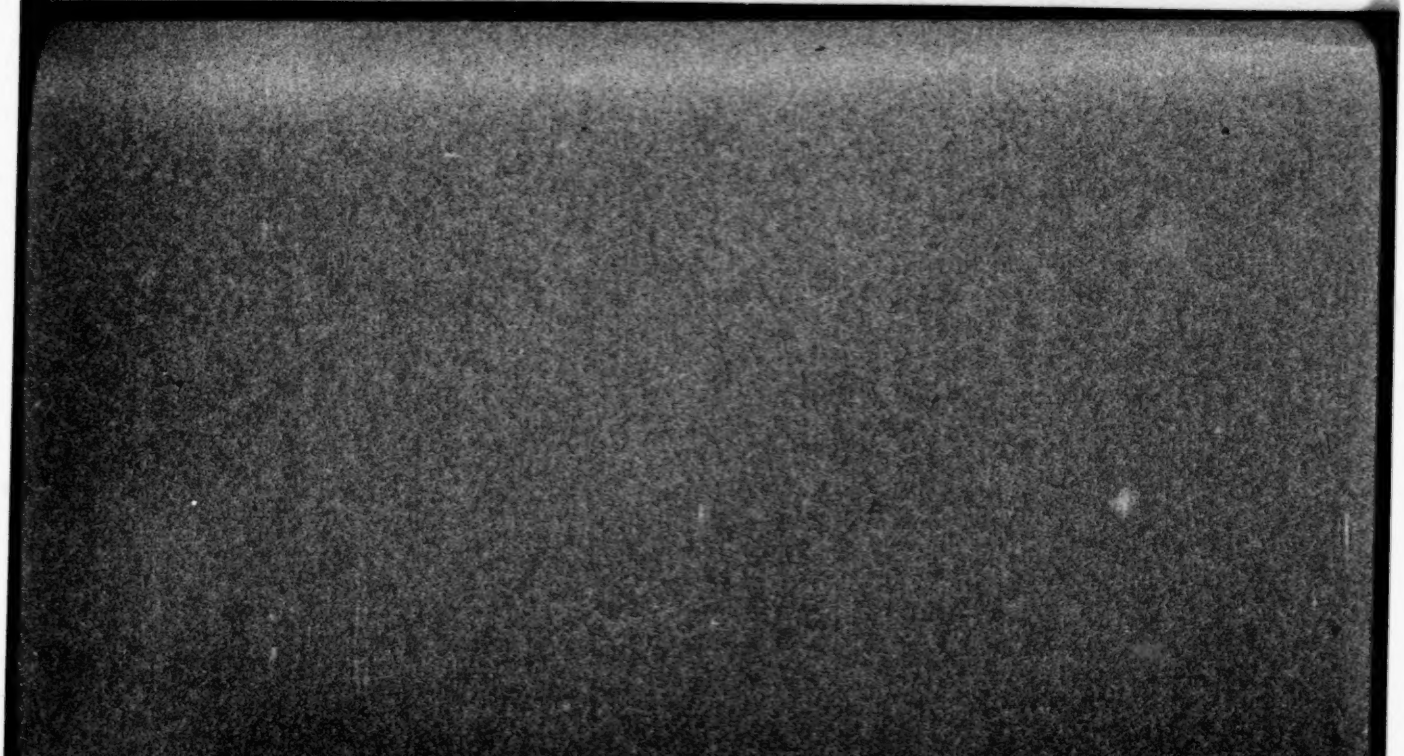

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Supreme Court of the United States

OCTOBER TERM, 1923.

No. 112.

RED CROSS LINE,
Petitioner,

against

ATLANTIC FRUIT COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

Statement of Facts.

This is a writ of certiorari to a judgment of the Supreme Court of the State of New York, entered upon a remittitur from the New York Court of Appeals, pursuant to a decision of the latter court reversing an order of the Appellate Division of the New York Supreme Court, First Department, and dismissing the proceedings of the petitioner. The order of the Appellate Division affirmed an order of Special Term, Part I of the New York Supreme Court, New York County, entered August 11, 1921,

directing the respondent, Atlantic Fruit Company, to proceed to the arbitration of a dispute arising out of a charter party of the steamship Runa and to appoint its arbitrator, pursuant to the Arbitration Law of the State of New York, Chapter 275 of the Laws of 1920.

On April 13, 1921, the petitioner served on the respondent, Atlantic Fruit Company, a copy of a verified petition accompanied by a notice that a motion would be made at Special Term, Part I of the New York Supreme Court, New York County, on April 21, 1921, for an order directing the respondent to proceed to arbitration of the petitioner's claim as set forth in the petition, pursuant to Chapter 275 of the Laws of 1920 (Record, pages 2, 3).

Article Fourth of the petition (page 3) sets up a charter party dated November 28, 1919, entered into in the City of New York, between the petitioner and respondent, whereby the respondent, the chartered owner of the Norwegian Steamship Runa, agreed to charter the vessel to the petitioner for a round trip between any safe port or ports in Canada or other British possessions not North of the St. Lawrence River, and/or the United States, at a charter hire of $25,000 per month.

Article Fifth of the petition (pages 3 and 4) sets up clause 3 of the charter party providing that in the event of loss of time from deficiency of men or stores, breakdown of machinery or damage preventing the working of the steamer for more than twenty-four hours at sea, the payment of the hire should cease until the vessel should be again in an efficient state to resume her service; also clause 11 of the charter party providing that the captain

should prosecute the voyage with the utmost despatch.

Article Sixth of the petition (page 4) sets up clause 23 of the charter party reading as follows:

> "That should any dispute arise between Owners and Charterers, the matters in dispute shall be referred to three persons in New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them, shall be final and for the purpose of enforcing any award, this agreement may be made a rule of court. * * *"

Article Eighth of the petition alleges that the master of the Runa did not prosecute the voyage with the utmost despatch in that the steamer was ready to sail from New York on the night of December 6, 1919, but that the master refused to proceed at that time, and delayed leaving until the following morning of December 7th; that the master when within approximately 100 miles of St. Johns, Newfoundland, the port of destination on the voyage, turned the Runa about and proceeded to the Azores, where the Runa was detained for twenty-one days, and that thirty-nine days were consumed on the voyage from New York to St. Johns, Newfoundland, instead of eight days, the normal running time; also that the Runa consumed an excess quantity of coal exceeding 298 tons (pages 4 and 5).

The petitioner further alleges in its petition that it was in ignorance of the true facts when it paid the charter hire, and accordingly paid the hire

under protest to prevent the withdrawal of the steamer from its service, and that by reason of the alleged failure of the master to prosecute the voyage with the utmost despatch, and the alleged deviation to the Azores, it is entitled to the return of the charter hire paid under protest, together with certain disbursements, amounting altogether to $35,256.96 (Articles Ninth and Tenth, page 5).

It is further alleged that the respondent failed and refused to pay the sum of $35,256.96, demanded by the petitioner, and denied and disputed its liability to pay such sum, with the result that a dispute and controversy thereby arose between the petitioner and the respondent (Articles Eleventh and Twelfth, page 5).

The petition further alleges a demand on the respondent for the arbitration of the dispute arising between the parties, as provided by the charter party, and the refusal of respondent to arbitrate. It is also alleged that the petitioner designated an arbitrator, but that the respondent refused to appoint its arbitrator (Articles Thirteenth-Seventeenth, pages 5 and 6).

The respondent refused to assume any responsibility for the payment to the petitioner of the sums demanded, and in response to the demand of the petitioner for arbitration, declined to arbitrate the dispute on the ground that if there was any liability it was not that of the respondent but of the Norwegian owner of the steamer who could not be brought into the controversy, except by petition, in the proper tribunal (Exhibit B-1 to petition, page 9, Exhibit E to petition, page 10).

Before the time set at Special Term for the hearing of the petition, the respondent appeared specially and removed the proceeding into the United

States District Court for the Southern District of New York, on the theory that it was a suit at law or equity arising under the Constitution and laws of the United States, and on the ground of diversity of citizenship between the parties (pages 18-22).

The petitioner then moved to remand the cause and it was subsequently remanded to the Supreme Court of New York, under an order entered in the office of the Clerk of the United States District Court for the Southern District of New York, on June 27, 1921 (page 22). The petitioner has insisted upon the printing of the removal proceedings in all of the records, including the present one, for what reason we do not know, as the removal proceedings have nothing to do with the merits of the dispute between the parties.

The petition of the Red Cross Line was then brought on for hearing before Mr. Justice William P. Burr at Special Term, Part I, on July 20, 1921. The respondent filed a verified answer to the petition denying its principal allegations as to the alleged failure of the master to prosecute the voyage with the utmost despatch, the deviation to the Azores, etc., and setting up a separate defense alleging that the dispute which had arisen between the parties was a maritime one and hence within the admiralty and maritime jurisdiction of the United States Courts, and consequently that the Arbitration Law of New York could not have been intended to apply to such a controversy, but that if it was intended to so apply, it is repugnant to Article III, Section 2, of the Constitution of the United States, to Section 24 of the Judicial Code of the United States, Subdivision Third, and to Section 256 of the Judicial Code of the United States, Subdivision Third (pages 12-16).

Affidavits of T. O. Muller, president of Atlantic Fruit Company, and John W. Crandall, of counsel for the company, were also submitted by the respondent in opposition to the petitioner's application. These affidavits also raised the question of the constitutionality of the Arbitration Statute (pages 16-18).

After hearing argument of counsel for and against the petitioner's application, Mr. Justice Burr granted the motion, and by an order entered August 11, 1921, directed the respondent to proceed to arbitration and appoint its arbitrator on or before August 20, 1921 (pages 1, 2).

The respondent appealed from the order of Mr. Justice Burr to the Appellate Division of the New York Supreme Court, First Department, which Court, in a judgment filed December 9, 1921, unanimously affirmed the order (pages 30, 31).

The respondent thereupon appealed to the Court of Appeals of the State of New York from the order of the Appellate Division, and the Court of Appeals (Opinion, Hogan, J., pages 36-40, *Matter of Red Cross Line* v. *Atlantic Fruit Co.*, 233 New York, 373), unanimously reversed the order appealed from, dismissed the proceedings and remitted the record to the Supreme Court of the State of New York, and a judgment in favor of the respondent was duly entered upon such remittitur (pages 32-34).

The petitioner then applied to this Court for a writ of certiorari, which application was granted and the writ was issued to the Supreme Court of the State of New York and filed December 26, 1922.

POINT I.

The dispute between the parties herein arose out of a maritime contract and hence is within the exclusive jurisdiction of the admiralty courts except as a common law remedy may have been saved to the petitioner. The New York Arbitration Law, under which this proceeding is brought, has provided a new remedy, unknown to the common law, for the adjustment of controversies. The New York Court of Appeals therefore properly dismissed the petition of the Red Cross Line on the ground that the Legislature was without power to include maritime disputes within the scope of the Arbitration Law and hence could not be presumed to have had such an intention.

We start with the proposition that a charter party of a vessel is a maritime contract and accordingly within the admiralty and maritime jurisdiction of the United States Courts, except for the saving clause of the Judicial Code hereafter discussed. On this point there can be no argument.

In *Morewood et al.* v. *Enequist,* 23 Howard, 491, this Court stated at page 493, as follows:

> "In the argument in this court, the counsel, without abandoning the original defense, have expended much learning and ingenuity in an attempt to demonstrate that a court of admir-

> alty in this country, like those of England, has no jurisdiction over contracts of charter party or affreightment. They do not seem to deny that these are maritime contracts, according to any correct definition of the terms, but rather require us to abandon our whole course of decision on this subject, and return to the fluctuating decisions of English common-law judges, which, it has been truly said, 'are founded on no uniform principle, and exhibit illiberal jealousy and narrow prejudice.'
>
> The errors of those decisions have mostly been corrected by legislation in the country of their origin; they have never been adopted in this.
>
> We do not feel disposed to be again drawn into the discussion of the arguments which counsel have reproduced on this subject."

The Court then referred to its decision in the cause of *New Jersey Steamboat Company* v. *The Merchants' Bank of Boston,* and stated as follows, at page 493:

> "The whole subject was most thoroughly investigated both by counsel and the Court. Everything connected with the history of courts of admiralty, from the reign of Richard the Second to the present day—everything which the industry, learning, and research, of most able counsel could discover, was brought to our notice. We then decided that charter parties and contracts of affreightment are 'maritime contracts' within the true meaning and construction of the Constitution and act

of Congress, and cognizable in courts of admiralty by process either in *rem* or in *personam.*"

In *Metropolitan S. S. Co.* v. *Pacific Alaska Nav. Co.*, 260 Fed., 973, a libel was filed upon an alleged charter party with the respondent and the respondent excepted on the ground that the contract was not a maritime one. The Court overruled the exceptions and stated as follows, at page 977:

"The initial defense raised by the respondent is that the contract stated is not a maritime contract. I cannot sustain this defense. The part of the libel to which I have called attention clearly presents a case of the hiring of the two ships for the carriage of persons and property on the Pacific Coast, between certain designated points, in navigable waters. It clearly presents something more than a mere foundation for future maritime contracts, to be made by the respondent, for the carriage of passengers and freight upon the ships. It states a case of the hiring of these ships to a charterer, such charterer to have exclusive possession of them, to keep them in repair, carry passengers and freight with them between certain designated ports upon the high seas, to preserve their tackle, apparel and furniture, and, upon termination of the contract, to have on board, for the benefit of the libelants, certain enumerated property. It states a failure on the part of the respondent to carry out the terms of this contract. I think this agreement, as stated, meets the requirements of a charter

> party. It is a maritime contract, entitled to be adjudicated in a court of admiralty. As Mr. Benedict has said, it is the substance of an undertaking, and not the mere form of words, which creates liability and confers jurisdiction. The substance of the undertaking, here stated, has reference to a specific, determined, maritime service of two ships hired to the respondent for the carriage of persons and property, upon navigable waters."

In *Dunbar* v. *Weston*, 93 Fed., 472, the Court said:

> "This is an action in *personam* to recover damages for the breach of a charter party. Such a charter is a maritime contract within the jurisdiction of this Court."

It is also unquestionable that the petitioner and the respondent are parties to a dispute involving and arising out of a charter party of the steamship Runa. Had the petitioner begun an action against the respondent at common law or in admiralty upon the claim appearing in its petition herein, its allegations would have been substantially identical with those of its present petition.

The petitioner alleges the entering into of the charter party between it and the respondent, sets up the clause providing that the master shall prosecute the voyage with the utmost dispatch and the "off-hire" clause providing that the hire of the vessel shall cease in the event of loss of time from deficiency of men or stores, etc., for more than 24 hours at sea. The petitioner alleges a breach of

the charter party in the alleged failure of the master of the Runa to prosecute the voyage with the utmost despatch, resulting in a delayed departure, it is claimed, from New York, which in turn was the cause of the steamer encountering a heavy storm; that there was a deficiency of stores which brought into operation the "off-hire" clause of the charter party for a certain definite length of time; that the master of the Runa made an unwarranted deviation to the Azores, far out of the normal course of a voyage between New York and St. Johns, Newfoundland, and while at the Azores took on an excessive supply of coal for the voyage back to St. Johns. The petitioner claims that it paid the charter hire for the alleged "off-hire" period under protest and in ignorance of the true state of facts, and also that it made a large number of disbursements which, under the circumstances, were for the owner's account. For these payments and expenditures it demands reimbursement.

Instead, however, of filing a libel against the respondent, or beginning a common law action, as was permissible under the saving clause of the Judicial Code, it instituted this proceeding under the Arbitration Law of New York to compel the respondent to arbitrate the controversy which had arisen, pursuant to the arbitration clause of the charter party.

The right of the legislatures of the several States to pass laws applying to or in any way affecting matters of a maritime nature is strictly limited. Were it not for the saving clause of the Judicial Code hereafter referred to, the admiralty courts would have exclusive jurisdiction over all maritime causes.

Section II of Article III of the Constitution of the United States provides in part as follows:

> "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

Judicial Code, Section 24, U. S. Comp. Stat., Sec. 991, Subdivision Third, provides as follows:

> "The district courts shall have original jurisdiction as follows: * * * Third. Of all civil causes of admiralty and maritime jurisdiction saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

Section 256 of the Judicial Code, U. S. Comp. Stat., Section 1233, Subdivision Third, provides as follows:

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States; * * *
> Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common-law is competent to give it."

The saving clause of the Judicial Code refers on its face to remedies, and this has been construed to mean common-law remedies and not remedies in common-law courts.

In *The Moses Taylor,* 4 Wallace, 411, Mr. Justice Field, delivering the opinion of the Court, and

considering the saving clause which is now embodied in Section 24 of the Judicial Code, stated as follows at page 431:

> "The cause before us is not within the saving clause of the ninth section. That clause only saves to suitors 'the right of a common-law remedy, where the common-law is competent to give it.' *It is not a remedy in the common-law courts which is saved, but a common-law remedy.* A proceeding in *rem*, as used in the admiralty courts, is not a remedy afforded by the common-law; it is a proceeding under the civil law. When used in the common-law courts, it is given by statute." (Italics ours.)

In *Chelentis* v. *Luckenbach, etc.*, 247 U. S., 372, the Supreme Court considered the saving clause in question, and stated as follows at page 384:

> "The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim. A remedy is the means employed to enforce a right or redress an injury. (Bouvier's Law Dictionary.) Plainly, we think that under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common-law, but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law."

This Court has held that the Workmen's Compensation Act of New York provided a *remedy* and was

unconstitutional so far as such remedy was designed to cover matters of a maritime nature.

In *Southern Pacific Company* v. *Jensen*, 244 U. S., 205, the Court stated as follows at page 218:

> "*The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common-law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction.*" (Italics ours.)

In *Knickerbocker Ice Company* v. *Stewart*, 253 U. S., 149, the Court stated at page 158:

> "We also pointed out that the saving clause taken from the original Judiciary Act had no application, since, at most, it only specified common-law remedies, *whereas the remedy prescribed by the compensation law was unknown to the common-law and incapable of enforcement by the ordinary processes of any court.*" (Italics ours.)

The Court also stated at page 161:

> "The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten. Also, it should be noted that federal laws are constantly applied in state courts—unless inhibited their duty so requires. Constitution, Article VI, Clause 2; Second Employers' Liability Cases, 223 U. S., 1, 55. Consequently

mere reservation of partially concurrent cognizance to such courts by an act of Congress conferring an otherwise exclusive jurisdiction upon national courts, could not create substantive rights or obligations or indicate assent to their creation by the States."

And again at page 162:

> *"The usual function of a saving clause is to preserve something from immediate interference—not to create.* * * *" (Italics ours.)

In the instant case the petitioner relies upon the remedy given by the Arbitration Law of New York. (Chapter 72 of the Consolidated Laws of New York; Chapter 275 of the Laws of New York of 1920.)

Article 2, Section 2 of this law provides as follows:

> **"Validity of arbitration agreements.** A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, or article eighty-three of the civil practice act, shall be valid, enforcible and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Section 3 permits the party aggrieved by the refusal of the other party to the arbitration agreement

to arbitrate, to petition the Supreme Court or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in the contract, upon eight days' notice to the adverse party. The Court, after a hearing, if the existence of the arbitration contract is admitted, is obliged thereupon to make an order directing the parties to proceed to arbitration in accordance with the terms of the arbitration agreement. Section 4 provides that in the event of the failure of a party to name an arbitrator, the Court shall designate an arbitrator on his behalf.

Article 3, Section 8 of the law incorporates into the act Sections 2365 to 2382 of the New York Code of Civil Procedure. Section 2373 of the Code provides for the confirmation of the award of the arbitrators by the Court, and Section 2378 and the following sections provide for the entry of judgment upon the order of confirmation in the same manner as upon a referee's report in an action and for the docketing of the judgment entered upon the award and the issuance of an execution thereon. The Code provides that after the judgment on the award has been entered and docketed it shall have the same force and effect as a judgment in any other action and an appeal can be taken from it in the same manner as from any other judgment. (The subject of arbitration is now covered by Sections 1448 to 1469 of the new Civil Practice Act of New York.)

That the New York Arbitration Law created a new remedy was decided by the New York Court of Appeals even before the present decision, in the case of *Matter of Berkovitz* v. *Arbib & Houlberg* and *Spiritusfabriek Astra of Amsterdam, Holland*

v. *Sugar Products Company*, 230 N. Y., 261, where it was stated as follows, at page 270:

> "The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies * * *. The rule to be applied is the rule of the forum. Both in this Court and elsewhere, the law has been so declared. Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing."

The Court further stated, at page 272:

> "Here the wrong to be redressed is the rejection of merchandise in violation of a contract. Such a wrong had a remedy for centuries before the statute. All that the statute has done is to make two remedies available when formerly there was one."

The Court of Appeals in its opinion in the present case (233 New York, 373), reiterated its previous construction of the purpose and effect of this statute.

Mr. Justice Hogan who wrote the opinion stated at page 381:

> "The section of the Arbitration Law (Section 3) under which the order herein was granted has been construed by us as a statutory legal remedy of a character unknown to

> the common law (Matter of *Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N. Y., 261); it, therefore, is not embraced within the exceptions contained in the Judicial Code."

This Court has already in several instances recognized the binding effect of the construction and interpretation of a State statute by the highest court of that State.

In *Quong Ham Wah Co.* v. *Industrial Accident Commission of the State of California, et al.*, 255 U. S., 445, wherein the highest court of the State of California construed its Workmen's Compensation Law to apply to residents and non-residents indiscriminately, this Court through Mr. Chief Justice White, stated as follows at page 448:

> "But it is elementary that this Court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the State. * * * It is hence obvious that the proposition upon which alone jurisdiction to entertain the writ can be based is so wanting in foundation as to be frivolous and therefore to impose upon us the duty to dismiss the cause for want of power to entertain it."

Again in *Ward & Gow* v. *Himan Krinsky and State Industrial Commission*, 66 L. Ed., page 616, in which the validity of the extension by the legislature of New York of the benefits of the Workmen's Compensation Act to persons in such a category as salesmen in the newsstands in the New York subway stations was in question, Mr. Justice Pitney stated as follows, at page 618:

> "In the exercise of our appellate jurisdiction we are bound by the construction of the state law adopted by its court of last resort; hence, for present purposes it must be taken as settled that the legislature intended the Compensation Law, as amended, to apply to an employee in Krinsky's situation, precisely as if it were so declared in the words of the statute. Our function is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the 14th Amendment upon state action."

Indeed it is highly questionable, in view of the foregoing authorities, whether there is anything at all for this Court to review, inasmuch as the Court of Appeals, by holding that the Arbitration Law was not intended to apply to maritime controversies, has left nothing of a federal nature for this Court to consider. Surely the conclusion of the Court of Appeals that the present dispute is a maritime one does not present a federal question for review.

It is true that this Court in *State Industrial Commission of the State of New York* v. *Nordenholt Corporation, et al*, 259 U. S., 263, did review on a writ of certiorari the decision of the New York Court of Appeals that a stevedore, killed on a dock while unloading a vessel, was employed in a maritime service and hence a claim for allowance could not be made by his mother under the Workmen's Compensation Act. The case was reviewed, however, because the Court of Appeals had proceeded upon an erroneous conclusion as to the effect of the decisions in *Southern Pacific Co.* v. *Jensen*, *Knickerbocker Ice Company* v. *Stewart*, and *Clyde S. S. Co.* v. *Walker*.

The Court of Appeals in the present proceeding has not passed upon the constitutionality of the Arbitration Law one way or the other, but has simply held that the act does not apply to maritime controversies because such an extension of its scope was outside of the power of the legislature.

If the Court of Appeals has erred in its decision that the dispute between the petitioner and the respondent is a maritime one, the petitioner has thereby in no way been deprived of any constitutional right, nor have its rights under the federal laws suffered any abridgement whatsoever.

We therefore earnestly suggest for the consideration of the Court the question as to whether the New York Court of Appeals has not finally disposed of the whole matter by limiting the scope of the statute to disputes outside of the jurisdiction of the admiralty courts.

It would therefore appear unnecessary to review the decisions of this Court which have defined to what extent a State legislature is authorized to enact laws affecting matters of a maritime nature, but should this Court decide to review the question *de novo*, in spite of the holding of the New York Court of Appeals, the authorities to be cited will be found to amply support and justify the conclusion of that Court.

Mr. Justice Hogan of the Court of Appeals stated in the instant case (*Matter of Red Cross Line* v. *Atlantic Fruit Co., supra*), at page 382:

> "In the present case, the agreement to arbitrate which is sought to be enforced is part of a maritime contract. It is contained in a charter party and such clause is void in the federal forum. (*United States Asphalt Re-*

fining Co. v. *Trinidad Lake Petroleum Co.*, 222 Fed. Rep., 1006, and cases cited therein.)

To sustain the arbitration clause and enforce the same in the state courts would deny to the federal court the exclusive jurisdiction with which Congress has clothed it, and likewise destroy a rule of uniformity (*So. Pac. Co.* v. *Jensen*, 244 U. S., 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S., 149)."

In *The Chusan*, 5 Fed., Cases, No. 2717, Mr. Justice Story, in considering a libel for supplies furnished to a bark in connection with a local law of the State of New York giving a lien for repairs, supplies, etc., stated at page 682:

"The truth is, that the admiralty and maritime jurisdiction of the courts of the United States, given by the Constitution, covers not merely the cognizance of the case, but the jurisdiction and principles, by which it is to be administered. It covers the whole maritime law, applicable to the case in judgment, without the slightest dependence upon or connection with the local jurisprudence of the state on the same subject.

The subject matter of admiralty and maritime law is withdrawn from state legislation, and belongs exclusively to the national government and its proper functionaries."

The Court also said at page 684:

"It cannot be that a state has a right to step in, and by way of complement fill up by its own legislation, what is not actually occupied by that of congress."

In *The Hine* v. *Trevor*, 4 Wall., 555, a collision occurred between two steamboats on the Mississippi River and later the owners of one of them, the "Sunshine," caused the "Hine" to be seized under a State court proceeding. The State of Iowa gave a lien by statute for injuries to property caused by vessels. The owners of the "Hine" interposed a plea to the jurisdiction of the State court. The case finally came before the Supreme Court on a writ of error. The Supreme Court held that the State court was without jurisdiction and stated as follows at page 571:

> "2. It is said that the statute of Iowa may be fairly construed as coming within the clause of the ninth section of the act of 1789, which 'saves to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it.'
>
> But the remedy pursued in the Iowa courts, in the case before us, is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding in *rem*. The statute provides that the vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names. That a writ may be issued and the vessel seized on filing a petition similar in substance to a libel. * * *
>
> While the proceeding differs thus from a common-law remedy, it is also essentially different from what are in the West called suits by attachment, and in some of the other States foreign attachments. * * *
>
> Such actions may, also, be maintained in *personam* against a defendant in the common-

law courts, as the common law gives, all in consistence with the grant of admiralty powers in the ninth section of the Judiciary Act.

But it could not have been the intention of Congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by State statutes, for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal Courts would be defeated. In the act of 1845, where Congress does mean this, the language expresses it clearly, for after saving to the parties, in cases arising under that act, a right of trial by jury, and the right to a concurrent remedy at common law, where it is competent to give it, there is added, 'any concurrent remedy which may be given by the State laws where such steamer or other vessel is employed'" (Italics ours).

In *Brookman* v. *Hamill*, 43 N. Y., 554, an action on a bond given in an attachment proceeding permitted by a State statute to enforce a claim for wharfage, it was held by the Court of Appeals of New York that such a contract was maritime and that an attempt by the State courts to enforce it by a remedy unknown to the common law was void. Speaking of the Judicial Code, Section 24, the Court stated at page 557:

"This Act absolutely divests the state tribunals of jurisdiction to enforce maritime claims or contracts subject only to the proviso which saves to suitors the right in such cases to pur

> sue in the state courts such common law remedies as the common-law is competent to give. It is impossible to escape the conclusion that any state law which attempts to provide for the enforcement of a maritime claim or contract by any but a common law remedy infringes upon the exclusive jurisdiction of the Federal Courts over that class of cases and is as clear a violation of the Federal compact as would be a law providing for the enforcement by state tribunals of the rights of patentees or any other description of claims exclusively cognizable in the courts of the United States" (Knapp Stout & Co. v. McCaffrey, 177 U. S., 638).

In *The Lotawanna*, 21 Wallace, 558, this Court considered the question whether a State statute giving a lien for supplies, repairs and materials supplied to a vessel in her home port was enforceable in a United States Court of Admiralty when such a lien had not as yet been given expressly by the general maritime law. The Court held that such a lien was valid in the absence of any action on the part of Congress, because the subject matter of the lien did not require the exclusive exercise of the power of Congress to regulate commerce.

On the question of the general system of maritime law, the Court stated as follows at page 574:

> "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Con-

> stitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'"

And again at page 575:

> "One thing, however, is unquestionable. The Constitution must have referred to a system of law co-extensive with, and uniform in, the whole country. It certainly could not have been the intention to place the rules and limits of the maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

In *The J. E. Rumble*, 148 U. S., 113, this Court held that in deciding a question of priority between a mortgage on a vessel and a lien for repairs given by State statutes, it was not controlled by the decisions of the State courts and stated as follows:

> "The admiralty and maritime jurisdiction is conferred on the courts of the United States by the constitution and cannot be enlarged or restricted by the legislation of a state."

Not only have the States no power to enact laws giving to suitors an admiralty remedy such as a suit in *rem*, but they have no authority to pass any

law regulating or affecting maritime matters which may tend to impair that uniformity which is so essential to the application of the maritime law through all of the States.

In *Union Fish Company* v. *Erickson*, 248 U. S., 308, an action was brought in the admiralty court of the Northern District of California on a contract to act as master of the respondent's vessel. The contract in question was an oral one made in California and the respondent pleaded the California Statute of Frauds providing that oral contracts not to be performed in one year are void. The Court held that the California Statute could not control the general maritime law and stated as follows at page 312:

> "We have, then, a maritime contract for services to be performed principally upon the sea, and the question is, can such an engagement be nullified by the local laws of a state where the contract happens to be entered into, so as to prevent its enforcement in an admiralty court of the United States?"

The Court further stated at page 313:

> "The maritime law controlled in this respect and was not subject to limitations because the particular engagement happened to be made in California."

And again at page 314:

> "If one state may declare such contracts void for one reason, another may do likewise for another. Thus the local law of a state may

> deprive one of relief in a case brought in a court of admiralty of the United States upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rules of the states."

In *Southern Pacific Company* v. *Jensen*, 244 U. S., 205, this Court held that the New York Workmen's Compensation Act did not apply to a person engaged in stevedoring work aboard a vessel. The Court stated that the remedy given by the State statute did not come within the saving clause of the Judicial Code and held the statute unconstitutional as applied to maritime matters, stating as follows at page 214:

> "Article III, S. 2, of the Constitution extends the judicial power of the United States 'To all cases of admiralty and maritime jurisdiction'; and Article I, S. 8, confers upon the Congress power 'To make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.' Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. * * * And further, that in the absence of some controlling statute the general maritime law as accepted by the Federal Courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction."

The Court further stated as follows at page 216:

"In view of these constitutional provisions and the federal act it would be difficult, if not impossible to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute, * * * and the right given to recover in death cases * * *. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings in *rem* according to the course in admiralty * * * nor create liens for materials used in repairing a foreign ship. * * * And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lotawanna*.

A similar rule in respect to interstate commerce deduced from the grant to Congress of power to regulate it is now firmly established.

> 'Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.' * * * And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the States to interpose where maritime matters are involved."

The Court also stated at page 217:

> "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."

In *Knickerbocker Ice Company* v. *Stewart*, 253 U. S., 149, this Court passed upon the amendment to Section 24 of the Judicial Code, adding to the saving clause a reservation to claimants of rights and remedies under the Workmen's Compensation Law of any State and held such amendment unconstitutional as an attempt by Congress to delegate powers granted to it by the Constitution, which, in their very nature, were non-dele-

gable. The Court referred to the cases of *Southern Pacific Company* v. *Jensen, supra,* and *Union Fish Company* v. *Erickson, supra,* and stated as follows at page 160:

> "As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect to them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.
>
> Since the beginning, Federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States— not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago."

The Court further stated as follows at page 164:

> "And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.
>
> Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodied both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others."

And finally at page 166:

> "Obviously if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

In *Chelentis* v. *Luckenbach Steamship Company, Incorporated*, 247 U. S., 372, the petitioner, who was employed as a fireman on the steamship "J. L. Luckenbach," was knocked down by a wave and sustained a broken leg while engaged in the performance of his duties on the deck at sea during a heavy wind. When the vessel arrived at her destination he was placed in a marine hospital and his leg amputated. He afterwards commenced an action in the New York Supreme Court, New York County, for full indemnity for his damages, stating that his injuries resulted from a negligent and improvident order of a superior officer. The defendant removed the action to the United States District Court and there insisted that inasmuch as the work of the seaman was of a maritime nature maritime rules should be applied on the question of damages. The Court applied such rules and directed a verdict for the defendant which was affirmed by the Circuit Court of Appeals for the Second Circuit and later by this Court.

The Supreme Court, Mr. Justice McReynolds delivering the opinion, quoting from the opinion of the Circuit Court of Appeals in the same case, stated as follows, at page 379:

> " 'The contract of a seaman is maritime and has written into it those peculiar features of the maritime law that were considered in the case of *The Osceola* (189 U. S., 158); and although, because of these peculiarities, such contracts are almost invariably litigated in admiralty courts, still the contract must be the same in every court, maritime or common law. The only difference between a proceeding

in one court or the other would be that the remedy would be regulated by the *lex fori*. If a seaman who had been locked up or put in irons for disobedience of orders were to sue the master for damages in a court of common law, he could not recover like a shore servant, such as a cook or chauffeur, who had received the same treatment. So a seaman bringing suit in a common law court for personal injuries could recover, even if guilty of contributory negligence, although a shore servant suing in the same court could not; and a seaman suing in a common law court for personal injuries could recover (except in the case of unseaworthiness of the vessel or failure to give proper care and medical attention) only wages to the end of the voyage and the expenses for maintenance and cure for a reasonable time thereafter, whereas in a similar case a shore servant would be entitled to recover full indemnity. Therefore, by virtue of the inherent nature of the seaman's contract, the defendant's negligence and the plaintiff's contributory negligence were totally immaterial considerations in this case; the sole question for the jury to determine being whether the plaintiff was entitled to recover because he had not received from the defendant his wages to the end of the voyage and the expense for his maintenance and cure for a reasonable time thereafter.' "

The Court further stated as follows, at page 382:

"The work about which petitioner was engaged is maritime in its nature; his employ-

ment was a maritime contract; the injuries received were likewise maritime and the parties' rights and liability were matters clearly within the admiralty jurisdiction. *Atlantic Transportation Co.* v. *Imbrovek*, 234 U. S., 52, 59, 60. And unless in some way there was imposed upon the owners a liability different from that prescribed by maritime law, petitioner could properly demand only wages, maintenance and cure. Under the doctrine approved in *Southern Pacific Co.* v. *Jensen*, no State has power to abolish the well-recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

In *Watts* v. *Camors*, 115 U. S., 353 (6 Supreme Court Reporter, 91), this Court had under consideration a charter party which contained a clause binding the parties to the true performance of the agreement in the penal sum of the estimated amount of freight. The Civil Code of Louisiana had been pleaded on the question of the stipulated damages.

The Court disregarded the Louisiana Statute and stated as follows, at page 95:

"But the law of Louisiana does not govern this question, whether it is treated as a question of construction of the contract of the parties, or as a question of judicial remedy.

If it is considered as depending upon the intent of the parties as manifested by their written contract, the performance of that contract is to be regulated by the law which they must be presumed to have had in view when they executed it. * * * Americans and Englishmen, entering into a charter-party of an English ship for an ocean voyage, must be presumed to look to the general maritime law of the two countries, and not to the local law of the state in which the contract was signed. If it is considered as a question of the remedy and relief to be judicially administered, the equity and admiralty jurisdiction of the courts of the United States, under the National Constitution and laws, is uniform throughout the Union, and cannot be limited in its extent, or controlled in its exercise, by the laws of the several states. *U. S.* v. *Howland*, 4 Wheat, 108; *Livingston* v. *Story*, 9 Pet., 632; *Russel* v. *Southard*, 12 How., 139; *Neves* v. *Scott*, 13 How., 268; *The Chusan*, 2 Story, 455; *The St. Lawrence*, 1 Back., 522; *The Lottawanna*, 21 Wall., 558; Rev. St., Sections 913, 914. The Circuit Court, therefore, rightly held that the charterers were liable only for the amount of damages which their breach of the contract had actually caused to the owner of the ship."

In *Workman* v. *New York City, Mayor, Aldermen and Commonalty*, 179 U. S., 552, Workman, the libellant, was the owner of a barkentine which was struck and injured while moored to a dock in the East River in New York City, by a steam fireboat of the city, which at that time was running into a slip to extinguish a fire in a warehouse. The

libellant filed his libel personally against the Aldermen and Commonalty of the City of New York, and it was subsequently amended to make the New York Fire Department and the navigator of the fire-boat parties respondent.

The United States District Court held that under the local law of New York the city was liable for negligent management of a fire-boat, but this decision was reversed by the Circuit Court of Appeals, which held that the city, in operating the fire-boat, performed a governmental and not a corporate function, and therefore under the local decisions could not be held liable.

This Court, however, held that the maritime law and not the local law prevailed, and Mr. Justice White, delivering the opinion, stated at page 557:

> "The proposition then which we must first consider may be thus stated: Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts and when the wrongdoer is amenable to process, nevertheless, the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular State or the course of decisions therein. And this, not because, by the rule prevailing in the State, the wrongdoer is not generally responsible and usually subject to process of courts of justice, but because in the commission of a particular act causing direct injury to a person or property it is considered, by the local decisions, that the wrongdoer is endowed with all the attributes of sovereignty, and therefore

as to injuries by it done to others in the assumed sovereign character, courts are unable to administer justice by affording redress for the wrong inflicted.

The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusions to result would amount to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to the Federal Government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright and commerce clauses of the Constitution. It would result that a

municipal corporation, in the exercise of administrative powers which the state law determines to be governmental, could with impunity violate the patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels. This follows if a corporation must for a wrong by it done, be allowed to escape all reparation upon the theory that, though ordinarily liable to sue and be sued, it possessed in the particular matter the freedom from suit which attaches to a sovereign State."

See also:

The Thielbek (C. C. A., Ninth Circuit), 241 Fed., 209;
Rodgers & Hagerty, Inc. v. *City of New York* (C. C. A., Second Circuit), 285 Fed., 362.

At this point it will be of interest to consider the decision of Circuit Judge Julian W. Mack, in the Southern District of New York in a suit between the present parties involving the same charter party, *Atlantic Fruit Co.* v. *Red Cross Line*, 276 Fed., 319.

On June 4, 1920, the Atlantic Fruit Company (respondent herein) filed a libel in the United States District Court for the Southern District of New York, against the Red Cross Line (petitioner herein) for the recovery of $4,518.99, balance of charter hire on the Runa for the voyage in question.

The Red Cross Line appeared in the admiralty action and filed an answer pleading the payment

of $35,256.96 under protest. It also set up in Paragraph Seventeenth of its answer a separate defense to the effect that it had made a demand on the Atlantic Fruit Company for arbitration pursuant to the New York Statute and that the Atlantic Fruit Company had refused to arbitrate. The Atlantic Fruit Company excepted to this defense as insufficient. At the same time the Red Cross Line made a motion for a stay of the admiralty action pending the determination of the arbitration proceedings. Both motions were heard by Judge Mack at the same time.

Judge Mack denied the motion of the Red Cross Line for a stay and sustained the exceptions of Atlantic Fruit Company to the defense based upon the Arbitration Statute, and stated at page 324:

> "If now the admiralty courts sitting in the state of New York were for that reason to regard the New York Arbitration Statute as binding upon them, the result would be that a libel for breach of a maritime contract would be barred in those admiralty courts, and not barred in the admiralty courts sitting in other states, a clear impairment of uniformity."

Submitting the New York Arbitration Law to the test laid down in the authorities cited, it is clear that if allowed to operate in matters of maritime cognizance, it would not only divest the Courts of the United States of their constitutional jurisdiction, but would result in a gross impairment of the uniformity of the maritime law.

When a party to an arbitration agreement initiates proceedings in the New York Supreme Court

under the Arbitration Law to compel the other party to arbitrate, he starts something which does not end until the issue has been finally and completely settled. And the matter can be disposed of without the necessity of recourse to any other court.

As already explained, the Supreme Court directs the party in default to arbitrate and to appoint his arbitrator, and by virtue of the incorporation of sections 2365 to 2382 of the New York Code of Civil Procedure (now sections 1448 to 1469 of the New York Civil Practice Act) into the Arbitration Law, the award of the arbitrators is confirmed by the Court, a judgment is entered thereon as upon a referee's report in an action, the judgment is docketed, execution may issue, and an appeal may be taken just as in any other action.

What would finally become of the admiralty law of the United States if the act under consideration were held to be a proper subject of State legislation as regards maritime controversies. Consider what the results would be. In the present case we would have such questions as to whether or not the master prosecuted the voyage with the utmost despatch, whether the vessel was off hire under the "break-down" clause in the charter, whether she encountered a peril of the sea or whether or not the deviation to the Azores was justified, submitted to the decision of arbitrators who might, but more probably would not, be versed in the maritime law. Certainly they would not be bound to follow any precedents and in most cases would probably not be lawyers at all and their award could only be set aside upon proof of fraud or of some other irregularity.

Furthermore, if the State of New York should be held entitled to force parties to submit their maritime disputes to the decision of arbitrators, pursuant to an arbitration agreement, what is there to prevent other States from providing some analagous remedy? The result can well be imagined.

We are confident that this Court, should it feel disposed to review the decision of the Court of Appeals on this point, will agree that the Act, if applied to maritime matters, would create untold confusion.

Reply to Petitioner's Argument.

The contentions of the petitioner may be summarized broadly in the following order:

1. That the Arbitration Law did not create a new remedy but merely made *available* the old remedy of specific performance.

2. That the proceeding initiated by the petitioner is not one to adjust the dispute between the parties as to whether or not the petitioner is entitled to reimbursement for alleged overpaid charter hire and disbursements but is merely a proceeding to enforce the arbitration agreement in the charter party; that arbitration and not a maritime dispute is the subject of the agreement.

3. That the arbitration agreement is not a maritime covenant; that a charter party is a bundle of covenants, maritime and non-maritime, and that the arbitration agreement falls within the latter group.

4. That the saving clause of the Judicial Code saved to suitors all remedies which might thereafter be provided by the States as long as they were not purely admiralty remedies.

5. That the Arbitration Law, in making available the alleged remedy of specific performance for arbitration clauses in maritime contracts, has entered a field where the admiralty courts cannot function because of their want of power to direct the specific performance of contracts, in line with the decision in *Steamboat Co.* v. *Chase*, 16 Wall., 522.

6. That, assuming that the issue in hand is the controversy over the repayment of the charter hire and the reimbursement of certain disbursements to the petitioner, this proceeding is nothing more or less than an ordinary suit for damages at common law, reinforced by the auxiliary process of compulsory arbitration, and is hence based upon a common law remedy within the saving clause.

We shall answer the above named points in the order given.

1. The petitioner has elaborately argued that the Arbitration Law has not created a new remedy but simply made available the old common-law remedy of specific performance. On the contrary there never was, before the passage of the Arbitration Law, any remedy for the specific performance of an arbitration agreement. The fact that the statute was passed is the best answer to such an argument.

An arbitration agreement such as the present one was never an enforceable agreement.

Judge Hough in an exhaustive opinion in *United States Asphalt R. Co.* v. *Trinidad Lake P. Co.*, 222 Fed. Rep., 1006, has reviewed the history of arbitration, and in considering an arbitration clause in a charter party practically identical with that in the charter under consideration, summed up his conclusions as follows, at page 1010:

> "Finally, in *Guaranty, etc., Co.* v. *Green Cove, etc., R. R. Co.*, 139 U. S., at page 142, 11 Sup. Ct., at page 514, 35 L. Ed., 116, Brown, J., considered a proviso in a mortgage to the effect that a sale by the trustee should be 'exclusive of all other' methods of sale, and he laid down the law thus:
>
> > 'This clause * * * is open to the objection of attempting to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts, which (as is settled by the *uniform current of authority*) cannot be done.' (Italics ours.)
>
> "The decision was filed in 1890. The latest opinion in this circuit known to me is *Gough* v. *Hamburg, etc., Co.* (D. C.), 158 Fed., 174, where Adams, J., lays down the rule without comment that any limitation upon the jurisdiction of courts contained in a contract is void."

Page 1012:

> "I think the decisions cited show beyond question that the Supreme Court has laid down the rule that such a complete ouster of juris-

diction as is shown by the clause quoted from the charter-parties is void in a Federal forum."

See also:

Insurance Co. v. *Morse*, 20 Wall., 457;
Doyle v. *Insurance Co.*, 94 U. S., 535;
Atlantic Fruit Co. v. *Red Cross Line*, 276 Fed., 319 and cases there cited.

The only recourse which a suitor would have had previous to the enactment of the Arbitration Law was a suit for damages for breach of contract. To say therefore that the statute has not created a new remedy is to blindly disregard a fact.

The Court of Appeals in its decision herein, disposed of this argument as follows (page 381 of its opinion):

"Counsel for the charterers urges that a remedy provided in the state court that makes available a remedy for the settlement of a maritime controversy through the specific performance of an agreement for that remedy is not an infringement of the jurisdiction of the Admiralty courts; that the charterers are not seeking a judgment for overpaid charter hire, etc., but an order decreeing that the arbitration proceed in the manner provided by the contract. Even if we assume that the proceeding is practically one to enforce specific performance of the arbitration clause of the contract, an order granting such relief presupposes the existence of a controversy the subject-matter of which is within the jurisdiction of the court granting the order. It would

be idle ceremony for the courts to grant an order requiring specific performance of an agreement to arbitrate a dispute, where upon an examination of the papers presented as the basis for such an order it is apparent that the subject-matter of the controversy which the "charterers" desire submitted to arbitration clearly arose under maritime clauses in a charter party over which the arbitrators could not assume jurisdiction even if arbitration was ordered."

At any rate, any argument by the petitioner as to whether the statute created or made available a remedy is foreclosed by the decision of the Court of Appeals, which this Court, in line with its previous decisions in *Quong Ham Wah Co.* v. *Industrial Accident Commission of the State of California, et al., and Ward & Gow* v. *Himan Krinsky and State Industrial Commission, supra,* will undoubtedly consider final and binding in this respect.

2. As to the nature of the dispute, the petitioner says that it is over arbitration and not over its right to the repayment of certain moneys.

The real object, however, which the petitioner had in view in beginning this proceeding was not to secure merely an order compelling the respondent to arbitrate, but was to have its right to reimbursement decided by arbitrators under the sanction of the Court.

It is impossible to separate into three distinct things the Arbitration Statute, the arbitration clause in the present charter and the real dispute

between the parties, in order to decide what really is the subject of the petitioner's remedy. Two things alone should be considered; first, the dispute over the payment of the petitioner's claim, and second, the Arbitration Statute and the arbitration clause, coupled together. The arbitration clause is not the subject of the petitioner's remedy at all, but, vitalized by the Statute, is the remedy itself. The Statute and the clause are inseparable.

Here again the decision of the Court of Appeals is binding, we submit, for it looks behind the naked arbitration agreement to the substantial dispute involved.

3. One of the petitioner's main points, if not its principal one, is that there is no dispute between the parties over which the admiralty courts have any jurisdiction. It is claimed that the arbitration agreement, even though found in a charter party, is not a maritime covenant.

In this connection, the arbitration clause should not be considered by itself dissociated from the charter party, for that clause is not really the subject of the petitioner's remedy. It *is* the petitioner's remedy, by virtue of the Statute.

If, however, the clause and not the real dispute is considered to be the subject of the remedy invoked, still the petitioner's argument falls, because an arbitration clause in a charter party is a subject of admiralty jurisdiction.

In *Munson* v. *Straits of Dover S. S. Co.*, 99 Fed., 787, a libel was filed in the admiralty court to recover damages for the respondent's breach of an agreement to arbitrate matters in dispute under a charter party. The dispute arose on a claim of

the owners of the steamship "Straits of Dover" for detention of the steamer beyond the charter period. The libellant offered to arbitrate the dispute but the ship owner refused and filed its libel in the Federal Court, which was subsequently dismissed. The respondent in the action brought on the breach of the arbitration agreement excepted to the libel and the Court sustained the exceptions on the ground that the subject of damages on the breach of an arbitration agreement was one too remote to be made the basis of an action. Nowhere in its opinion did the Court intimate that the arbitration agreement was not within the admiralty and maritime jurisdiction of the Court. It was stated as follows, at page 792:

> "While it may be possible that cases may arise in which there are damages that are the natural and proximate result of a refusal to refer to arbitration, I think that damages of the kind here sought to be recovered are not of that character."

This case was affirmed by the Circuit Court of Appeals for the Second Circuit in 102 Fed., 926, the Court holding that it was within the discretion of the lower Court to dismiss the suit where the party was entitled to nominal damages only.

Neither Judge Addison Brown nor the Circuit Court of Appeals apparently entertained any doubt that such an arbitration agreement was a maritime covenant. The question of the jurisdiction of the admiralty courts over a suit on an arbitration agreement in a charter party was argued in the briefs and it can be taken for granted

that if either the District or Circuit Court had considered that an admiralty court had no jurisdiction over a suit on such a covenant, some statement to that effect would have been made in the opinions.

The fact that the Court exercised its discretion in dismissing the libel because the damages were shown to be merely nominal, shows that the Court considered that it had jurisdiction of the contract. The Circuit Court of Appeals stated at page 928:

> "In admiralty, as in equity, it is in the discretion of the court to dismiss a suit, where the party is entitled to nominal damages only without costs, as was done in this case. Barnett v. Luther, 1 Curt., 434, Fed. Cas., No. 1,025; Merbst v. The Asiatic Prince (D. C.), 97 Fed., 343."

Moreover, in determining whether or not a contract is maritime, we must look to its subject matter rather than the mere agreement itself. The present arbitration agreement was made on land and would be performed on land, but nevertheless it refers to maritime disputes.

In *North Pacific Steamship Company* v. *Hall Brothers Marine Railway & Shipbuilding Company*, 249 U. S., 119, a libel in *personam* was filed against the steamship company to recover a balance claimed to be due for work, labor and services rendered and materials furnished in connection with the repairing of the steamer "Yucatan." The steamship company, after a decree had been entered in favor of the libellant, moved to vacate the decree and dismiss the cause for want of jurisdiction.

The "Yucatan" had been moored at the dock in Seattle, Washington, and needed extensive repairs. The libellant owned a shipyard, marine railway, etc., upon and near Puget Sound. It was agreed that the shipbuilding company should tow the vessel to the libellant's shipyard, haul her out upon dry land on a marine railway, and place her in the "dry dock" which was on land. The greater part of the repairs were made to the vessel while she was on land adjacent to the libellant's machine shop. It was contended by the respondent that the claim was not one of admiralty jurisdiction, because the service performed was not of a maritime nature. An appeal was taken direct to the Supreme Court from the order of the District Court for the Northern District of California, denying the respondent's motion. The order was affirmed and the Court held that the contract was a maritime one and stated at page 125:

> "It must be taken to be the settled law of this Court that while the civil jurisdiction of the admiralty in matters of tort depends upon locality—whether the act was committed upon navigable waters—*in matter of contract it depends upon the subject-matter—the nature and character of the contract; and that the English rule, which conceded jurisdiction, with a few exceptions, only to contracts made and to be executed upon the navigable waters, is inadmissible, the true criterion being the nature of the contract, as to whether it have reference to maritime service or maritime transaction.*" (Italics ours.)

It was also stated at page 125:

"In some of the earlier cases, the influence of the English rule may be discerned, in that the question whether a contract was to be performed upon the navigable waters was referred to as pertinent to the question whether the contract was of a maritime nature. (*The Thomas Jefferson*, 10 Wheat., 428, 429; *The Planter* [*Peyroux* v. *Howard*], 7 Pet., 324; 341; *Steamboat Orleans* v. *Phoebus*, 11 Pet., 175, 183; *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How., 344, 392); but a careful examination of the opinions shows that the place of performance was dealt with as an evidential circumstance bearing with more or less weight upon the fundamental question of the nature of the contract. If they go beyond this, they must be deemed to be overruled by *Insurance Co.* v. *Dunham*, *supra*" (11 Wall., 1, 26).

The Court also stated at page 128 as follows:

"What we have said sufficiently indicates the decision that should be reached in the case at bar. The contract as made contemplated the performance of services and the furnishing of the necessary materials for the repairs of the steamship 'Yucatan.' It was an entire contract, intended to take the ship as she was and to discharge her only when completely repaired and fit for the Alaskan voyage. * * * In *The Planter* (*Peyroux* v. *Howard*), 7 Pet., 324, 327, 341, the vessel, requiring repairs below the water line, as well as above, was to be and in fact was hauled up out of the water; and it was held that the contract for materials

furnished and work performed in repairing her under these circumstances was a maritime contract. We think the same rule must be applied to the case before us; that the doubt intimated in *The Robert W. Parsons*, 191 U. S., 17, 33, 34, must be laid aside; and that there is no difference in character as to repairs made upon the hull of a vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all."

In *Baltimore Steam-Packet Company* v. *Paterson*, 106 Fed. Rep., 736, the Circuit Court of Appeals for the Fourth Circuit had under consideration a libel in personam filed for breach of an agreement to ship freight on a certain vessel. The document was in the form of a freight engagement, stating that 1,000 bales of cotton had been booked with the libellant from Baltimore to Liverpool.

The Court held that the agreement was essentially maritime in its nature and that the District Court had jurisdiction of the subject matter.

In *Graham* v. *Oregon R. & Navigation Co.*, 135 Fed., 608 (S. D. N. Y.), the libellant entered into an agreement with the respondent providing reciprocal obligations, namely, that the libellant should furnish certain vessels to carry cargoes furnished by the respondent, and also that the respondent would furnish the cargoes for such vessels. The respondent excepted to the libel on the ground that a maritime cause of action was not set forth. Judge Adams of the Southern District of

New York overruled the exceptions and stated as follows, at page 611:

> "The allegations of the new libel set forth a contract for the furnishing of cargoes on the respondent's part and of steamships on the libellant's part to carry the cargoes. Such a contract is essentially maritime within the authorities."

It should be noted that the respondent was a railroad and that the cargoes to be furnished under the contract obviously came from inland points.

Furthermore, at the time when the petitioner demanded arbitration of the respondent and filed its petition, *the matters in dispute*, to settle which the petitioner called for arbitration, were obviously maritime and such as the admiralty courts are considering daily.

Under the cited cases therefore the matter to which the arbitration clause relates being maritime, it follows that the agreement is maritime and hence within the admiralty and maritime jurisdiction, except where a common-law remedy is saved.

The petitioner cites on page 15 of its brief the case of *The Ada*, 250 Fed., 194 (C. C. A., Second Circuit), where the Court had under consideration a charter party which contained covenants to purchase the captain's chronometer and the steamer's ice box. Of course these covenants could not be maritime in any respect because their subject matter was not maritime. They differ greatly, however, from a covenant to arbitrate disputes arising out of the charter party, particularly where maritime disputes to which the clause relates have arisen.

The petitioner also cites on page 23 of its brief the case of *Pacific Surety Company* v. *Leatham & Smith Towing & Wrecking Co.*, 151 Fed., 440, where the Court held that a bond securing the performance of a charter party was not a maritime obligation. It was held, of course, that the charter party was a maritime contract, but the admiralty court refused to take jurisdiction because the respondent executing the bond was not a party to the original maritime contract, and stated as follows, at page 441:

> "The appellant, however, as surety on the bond was no party to the maritime undertaking; neither promised performance of the charter service, nor was authorized under the contract terms to perform. Chamberlain was the sole contractor under the charter, which was neither assignable in terms, nor subject to performance of the obligations by another. The charter use and service were coupled with liabilities which made them personal and not open to performance by the appellant, if it so desired."

The distinction between the foregoing case and the present one is obvious. Here both parties to the maritime contract are before the Court and the covenant sought to be enforced is a component part of the agreement.

The case of *Haller* v. *Fox*, 51 Fed., 289, is opposed to *Pacific Surety Company* v. *Leatham & Smith Towing and Wrecking Co., supra,* Judge Hanford, in the *Haller* case, holding that a bond for the performance of a charter party is a mari-

time contract and within the admiralty jurisdiction.

The petitioner on page 12 of its brief lays down as an essential requisite of a contract to render it maritime, that it be an undertaking for the performance of maritime services or transactions. This definition is doubtless good in part, but is neither accurate nor broad enough to include all contracts which are within the admiralty jurisdiction. For example, a policy of marine insurance on the hull of a vessel is obviously a maritime contract and yet it is not an undertaking for the performance of maritime services. It is merely an agreement to indemnify the ship-owner for damage to or loss of the vessel. The subject of the contract being the ship, however, the agreement is maritime.

It is of course conceded that a charter party may contain non-maritime covenants and that actions solely for the breach of those covenants could not be maintained in an admiralty court simply because the covenants were contained in a contract otherwise maritime. A case of this type is *Richard* v. *Holman*, 123 Fed. Rep., 734, cited at page 13 of the petitioner's brief. This doctrine, however, is limited to such covenants as are distinct and separate in themselves and unrelated to the maritime provisions of the agreement. The arbitration covenant on the other hand is so inseparably connected with the other covenants of the charter which the petitioner concedes are maritime, that it cannot be considered apart from those provisions and as having a different and non-maritime character.

The petitioner contends that the rule laid down by the courts is that a contract consisting of inseparable covenants must be entirely maritime in

its nature to sustain a suit in admiralty. This is not the correct rule. In *The Ada, supra*, Judge Hough states as follows his reasons for concurring with the opinion of Judge Ward, who wrote the main opinion:

> "The rule that a contract, to be maritime, and therefore within admiralty jurisdiction, must be 'wholly maritime,' means that the principal subject-matter of agreement gives character to the whole. This construction of the phrase was adopted by this Court in The Pennsylvania, 154 Fed., 9, 83 C. C. A., 139. Applying it to this case, I doubt whether the contract made had any of the marks of a charter except it was an agreement to sell; the right to use pending payment was an incidental matter."

Judge Rogers, concurring also in the decision, stated as follows:

> "The contract involved is plainly a contract of sale. For a contract to fall within the admiralty jurisdiction, it must concern transportation by sea, relate to navigation or maritime employment, or be one of navigation and commerce of navigable waters. And the contract here does not come under any of these heads."

Judge Ward also stated at page 196:

> "All the provisions of the agreement show that the main intention was a contract of sale."

The true basis of determination therefore is whether the main object or "principal subject-mat-

ter" of the contract is maritime in its nature and not whether the contract is exclusively maritime. In the case at bar, obviously, the main object of the contract is maritime, and the only disputes which might arise thereunder are maritime.

The cases of *Western Fuel Company* v. *Garcia, Administrator of Souza*, 257 U. S., 233; *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S., 469, and *State Industrial Commission of the State of New York* v. *Nordenholt Corporation, et al.*, 259 U. S., 263, cited by the petitioner, in no way change or modify the rule laid down in the authorities previously cited.

The case of *Western Fuel Company* v. *Garcia, Administrator of Souza, supra*, cited *American Steamboat Co.* v. *Chase, supra*, and quite properly held that as long as the admiralty courts had never entertained suits under the general maritime law to recover damages for the death of a human being, it was not improper for a state to pass an act allowing a recovery in such an event, and that the admiralty courts could take jurisdiction of such a case.

The case of *Grant Smith-Porter Co.* v. *Rohde, supra*, proceeded upon the assumption that a carpenter who was working on a bulkhead enclosing tanks in a vessel which, although launched and lying in navigable waters, was incompleted and not yet in commission, was engaged in the performance of a non-maritime contract and hence the Workmen's Compensation Act of Oregon applied because neither the employee nor the employer had specifically rejected its provisions, as required.

In *State Industrial Commission, etc.* v. *Nordenholt Corporation, et al., supra*, this Court held that a longshoreman who was injured on a dock, an extension of the land, while engaged in the unload-

ing of a vessel lying in navigable waters, was not engaged in a maritime service and hence came within the provisions of the New York Workmen's Compensation Act.

4. The petitioner further argues that what the saving clause of the Judicial Code preserved to suitors was a common law remedy as distinguished from an admiralty remedy, implying that as long as the States do not create remedies which partake of the characteristics of remedies in admiralty such as proceedings in *rem*, they can pass any legislation that they see fit concerning maritime matters. This of course is not so. Not only cannot a State enact a law providing a remedy of a peculiarly admiralty nature against a ship in *rem*, but it cannot pass any law affecting matters of a maritime nature which impairs or tends to impair the essential uniformity of the maritime law in the United States.

That the rule is not confined to the class of legislation referred to by the petitioner is shown by the decisions in *Southern Pacific Co.* v. *Jensen*, and *Knickerbocker Ice Co.* v. *Stewart*, *supra*, where the constitutionality of the Workmen's Compensation Act of New York, in its application to maritime matters, and the amendment to the Judicial Code authorizing the States to pass Workmen's Compensation legislation, were considered.

In *Union Fish Company* v. *Erickson*, *Chelentis* v. *Luckenbach*, *Watts* v. *Camors, and Workman* v. *City of New York*, *supra*, no questions as to the validity of remedies in *rem* provided by State laws were involved, and yet it was held in all of those

cases that State laws and decisions had no effect where maritime matters were concerned.

5. The petitioner also makes the peculiar argument by some assumed analogy to the case of *Steamboat Co.* v. *Chase*, *supra*, that the Arbitration Law has made available a remedy, that of specific performance, which an admiralty court is powerless to grant to a suitor, and that therefore the state court has jurisdiction of such a remedy.

In *Steamboat Co.* v. *Chase*, *supra*, the suit was under a statute of a State giving an action for damages for the loss of life resulting from a collision on navigable waters. It was held by the Supreme Court, that inasmuch as there was no remedy in the admiralty courts at that time for such an injury, the State courts were at liberty to exercise jurisdiction in actions not cognizable in the admiralty courts just as if such courts were unknown to the Constitution. The same rule cannot be applied in the case of a claim connected with a charter party because the admiralty courts have always taken jurisdiction of suits involving such agreements.

6. The petitioner argues on pages 8, 9, 31, 32, 41-43 of its brief, that after all, the remedy relied upon is an ordinary common law remedy, because the proceeding is simply a common law suit for damages in the State court with the compulsory arbitration feature added. This argument flies directly in the face of the decision by the Court of Appeals herein that the section of the Arbitration Law under which the petitioner's order was granted is a *statutory legal remedy of a character unknown to the common law*, which construction this Court, following its previous decisions, will unquestionably consider itself bound to follow.

Petitioner's Assignments of Error.

On page 9 of its brief, the petitioner sets forth the errors which it assigns on the part of the New York Court of Appeals.

The first assignment charges that the State court erred in holding that to enforce the arbitration agreement in the State court would deny to the federal courts their exclusive constitutional jurisdiction.

The second assignment alleges that the Court erred in holding that the subject of the dispute is within the exclusive jurisdiction of the admiralty courts because it pertains to navigation.

The third assignment alleges error by the Court of Appeals in holding that the enforcement of the arbitration agreement in the State court would "destroy a rule of uniformity."

The first two assignments disclose either an entire misapprehension or a misconstruction of the decision of the New York Court of Appeals on the part of the petitioner. The petitioner for instance, on pages 33 and 34 of its brief picks out an extract from the opinion of the Court of Appeals stating that the question of liability is within the exclusive jurisdiction of the courts of admiralty, and argues therefrom that the Court of Appeals has not grasped the question.

It is elementary that, in order to ascertain what a Court has decided, its entire opinion must be looked at, as the petitioner itself well said in its brief in the Court of Appeals, from which we quote verbatim; "The appellant cannot use an isolated excerpt of the opinion to prove its contention. We must look at the whole opinion in order to construe any part thereof * * *."

That the Court of Appeals was well aware of the precise question involved is shown by the very first lines of its opinion (page 379), where it refers to the Judicial Code, and specifically mentions the clause saving common law remedies to suitors. It is therefore not correct to say that the Court of Appeals decided that the admiralty courts had absolute jurisdiction over all maritime matters. What it did say was that the admiralty courts have exclusive jurisdiction over maritime disputes, except as common law remedies may have been saved to suitors, and it held that because the Arbitration Statute did create a new remedy unknown to the common law it was not intended to apply to maritime disputes.

The Court of Appeals was not misled by the specious argument that *arbitration* was the only matter in issue, but it looked through to the real issue, which is purely maritime, and rightly decided that the Statute did not apply.

The petitioner draws the conclusion on page 16 from the following quotation from the opinion of the State Court (page 382): "Even if we assume that the proceeding is practically one to enforce specific performance of the arbitration clause of the contract, an order granting such relief presupposes the existence of a controversy the subject-matter of which is within the jurisdiction of the Court granting the order.", that the Court assumed that the petitioner was not seeking a judgment for the return of alleged overpaid charter hire. We submit that such an inference is absolutely unwarranted. What the Court obviously meant was that even granting the petitioner's argument, it would not lend its hand to do indirectly something which it otherwise had no power to do.

We have already answered the third assignment fully and need say no more in reference thereto.

POINT II.

The judgment of the Supreme Court of the State of New York, New York County, entered upon the judgment and remittitur of the Court of Appeals of New York should be affirmed.

Dated, New York, October 17, 1923.

Respectfully submitted,

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